85-1747

Supreme Court, U.S.
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No.

In the Supreme Court of the United States

Roderick Andrew McClain
Petitioner,

v.

United States Of America,
Respondent.

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I.

WHETHER THE DECISION BELOW REPRESENTS A DEPARTURE FROM ESTABLISHED PRINCIPALS OF THE LAW RELATING TO VARIANCE?

WHETHER THE DECISION BELOW REPRESENTS AN UNTOWARD APPLICATION OF THE "SURVEILLANCE LOCATION PRIVLEGE" WHICH DEPRIVED PETITIONER OF ACCESS TO INFORMATION WHICH MAY HAVE CONTRIBUTED SIGNIFICANTLY TO HIS DEFENSE?

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OPINION BELOW

The opinion of the Sixth Circuit Court of Appeals of February 26, is appended hereto as Appendix A.

JURISDICTION

The Opinion of the Sixth Circuit Court of Appeals affirming the trial court's Judgement and Commitment Order was entered on February 26, 1986. This Court's jurisdiction to review the decision of the Court of Appeals by Writ of Certiorari is invoked under 28 USC §1254(1).

PROVISION OF LAW INVOLVED

Fifth Amendment, United States Constitution:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

No.

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Roderick Andrew McClain
Petitioner,

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United States Of America,
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PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioner Roderick Andrew McClain was charged in a five count indictment together with co-defendants, Edward Wray, Richard Gazie, Lyle Parks and eight others. Count I charged a conspiracy to possess with intent to distribute cocaine, beginning in late 1980 and continuing until approximately September of 1982. McClain was also charged in counts 2 and 3 with interstate travel in aid of racketeering and with distribution of eight ounces of cocaine on or about January 30, 1982. Finally, defendants McClain, Wray and Lyle Parks were charged with conspiracy to possess with intent to distribute marijuana beginning in 1977 and continuing until approximately May 1982, Of the thirteen defendants originally charged, only McClain, Gazie and Wray went to trial.

In presenting its case, the government relied heavily on recordings of conversations obtained from a series of telephone wiretaps and surreptitiously planted microphones which were in operation between January 29, 1982 and March, 1982, on the telephones and premises of the homes of three Michigan residents. Although McClain's voice was never heard on the tapes, a number of references to an individual apparantely named "Rod" were made and the government contended that petitioner was the subject of these references.

During the trial, the defense attempted to cross-examine on the nature and location of the electronic surveillance equipment installed in the residences, in an effort to establish the possibility of distortion or unreliability in the recordings. Such a possibility of course, would have enabled the defense to challenge the accuracy of voice identification made through the use of the tapes, or more importantly, to suggest that the tapes (including the apparent references to "Rod") did not really reflect what was said by the speakers. The government, however, asserted a "surveillance location priviledge" and after hearing an *in camera* presentation from the government regarding the necessity for keeping the information secret, the trial judge upheld the government's claim of privilege and foreclosed examination in this area.

The focus of the testimony was Lyle Parks, a defendant who plead guilty prior to trial, but, unlike the bulk of the other guilty-pleading defendants, did not testify for the government. Parks, during the relevant time period, lived in an apartment in Saginaw, Michigan

which was also occupied at various times by his lieutenants in the drug business. The apartment, as the testimony and physical evidence developed, served not only as home to Parks and his associates, but was also a distribution point for cocaine, and virtually all of the intercepted telephone calls which were played to the jury concerned the group's efforts to get or distribute the drug.

Additionally, Parks was involved at one point in a marijuana smuggling operation, carrying trunk loads of marijuana to Canada. The marijuana charge of the indictment was based upon the premise that the defendant Wray, once a partner of Parks, later took over this operation, and that the defendant McClain, along with one Albert Papson, who was one of the government's principal witnesses at trial, was a supplier of marijuana.

The proofs as to the defendant Gazie were to the effect that he served as a Florida-based source of cocaine for Lyle Parks and for one David Murphy, who had been a customer of Parks' at one time. No testimony linked Gazie and Wray, and although there was evidence of telephone toll calls between Gazie and McClain, no testimony or other evidence established any drug-related connection between them.

By way of motion for judgement of acquittal, petitioner argued that the evidence as to cocaine showed multiple, fundamentally unrelated conspiracies, rather than the unitary conspiracy charged in Count 1, and that there was insufficient evidence to show that he made a delivery of cocaine on January 30, essential to both the substantive delivery count and the Travel Act violation alleged. The trial judge denied the motion, and permitted all counts to go to the jury. McClain did not present a defense.

On the fifth day of deliberations, the jury returned its verdict finding Gazie and Wray guilty of all charges against them, and McClain guilty of the cocaine conspiracy and not guilty of the substantive distribution and Travel Act charges and, not guilty of the marijuana conspiracy charge. On December 13, 1983, defendant McClain was sentenced to the custody of the Attorney General for a period of 10 years under the provision of 18 USC §4205 (b) (2), and to pay a fine in the amount of $10,000.00.

While the Sixth Circuit Court Appeals reversed the defendant Gazie's conviction on the grounds of misjoinder of counts (because

Gazie was not charged in the marijuana conspiracy of which petitioner was acquitted), it rejected the petitioner's claims of misjoinder and variance. The Court of Appeals likewise upheld the trial court's ruling regarding the "surveillance location privilege" holding that the "government's articulated need for the privilege was substantial and the handicap to defendants, if any, was minimal..." (Slip Opinion, page 21)

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW REPRESENTS A DEPARTURE FROM ESTABLISHED PRINCIPALS OF THE LAW RELATING TO VARIANCE

Count 1 of the indictment, the only charge of which the petitioner was convicted, alleged a single conspiracy between himself, Gazie, Wray, Parks and others to possess cocaine with the intent to distribute and to distribute. The proofs at trial, taken in the light most favorable to the government, showed the defendant Gazie to have been a continuing source of cocaine for Lyle Parks. There was, further, testimony to the effect that on a handful of occassions the defendant McClain supplied cocaine to the defendant Wray (through the agency of the witness Peterson). While there was evidence in the form of telephone toll records and certain real estate-related documents introduced by the defense, to the effect that Gazie and McClain knew each other, the only testimonial evidence even arguably linking McClain and Gazie was the statement which one witness attributed to Gazie via Parks. Parks owed Gazie some money, which Gazie said would go to "Rod" and that "the people that Rod owed money to weren't the kind of people you wanted to owe money to." However, the witness did not identify Rod McClain as the "Rod" in question, or testify that the source of the debt either from Gazie to Rod or Rod to "his people" was a drug transaction.

While the evidence suggested the possiblility that on one occasion Wray distributed half of a pound of cocaine to Parks there was no other evidence that Wray was a source of cocaine for Parks. One witness also testified that he and Parks once delivered cocaine to Edward Wray's house. And while a witness testified that on one occasion he observed Lyle Parks meet with McClain at a Denny's Restaurant in Florida, he did not claim to know the subject matter of

that meeting. Additionally, one co-conspirator testified that, notwithstanding his intimate knowledge of Lyle Parks' he knew of no cocaine transaction between Parks and McClain.

Thus, the evidence showed two parallel cocaine conspiracies rather than a single overall conspiracy alleged in the indictment. While each of the conspiracies might to be said to fit the classic "chain" model (Gazie, courier -- Parks, lieutenants, etc., and McClain-Peterson-Wray, etc.) they were not shown by any substantial evidence to be connected at the top (Gazie and McClain and only in the most sketchy fashion to be connected at the bottom (Parks and Wray were clearly linked in marijuana dealings, but less so with respect to cocaine). This, in petitioner's view, constituted a prejudicial variance from the allegations of the indictment and requires the reversal of his conviction.

A "variance" occurs when the facts proved at trial are different from those alleged in the indictment. A variance in the proofs is grounds for reversal when it affects a defendant's "substantial rights." *Berger* v *United States*, 295 U.S. 78, 82 (1935). Obviously, the Due Process requirement of fair notice of the charges to which a defendant must answer is implicit in the "variance" concept, as well as the Fifth Amendment requirement of trial upon indictment only. In addition to those considerations, the doctrine has been held to include "protection against the possiblility of a prejudicial 'spillover' effect." *United States* v *Flaherty*, 668 F2d 566, 582 (1st Cir. 1981), citing *inter alia*, *United States* v *Perez*, 489 F2d 51, 60 (5th Cir. 1973).

The cases make clear that where more than one conspiracy exists within the same general framework, locus or cast of characters, proof of the existence of the second enterprise at the trial of the first may, in the *Berger* formulation, infringe "substantial rights." The "multiple conspiracy" situation is a special case of the general "variance" formulation. Where one conspiracy is charged, but several are proven, reversible error occurs where proof of the second, uncharged conspiracy, or proof of acts unchargeable to the defendant under the proofs at trial result in unfair prejudice to a defendant. *United States* v *Toliver*, 541 F2d 958, 962-963 (2nd Cir. 1976); *United States* v *Coward*, 630 F2d 229 (4th Cir. 1980). In such a situation, prejudice may inure where there is a danger of confusion of the issues, or the jury is invited to convict a defendant because of the possibility of "spillover" of evidence not directly relevant to him, but adduced in the course of his trial. *United States* v *Snyder*, 720 F2d 985, 981

(8th Cir. 1983); *United States* v *Johnson*, 515 F2d 730, 735 (7th Cir. 1975).

The classic formulation of the "multiple conspiracy" doctrine is, of course, the decision of this Court in *Kotteakos* v *United States* , 329 U.S. 750 (1946). In that case, the Court held that a fatal variance occurred where the indictment alleged a single overall conspiracy relating to the making of fraudulent loans, but the proofs showed that, while each of the borrowers independently entered into a conspiracy with respect to their loans with the official who arranged them, no agreement between the several borrowers was shown. Thus, while each of the borrowers may have been properly said to have been involved in the conspiracy with the official arranging the loans (with respect to their individual loans), the single overall conspiracy alleged in the indictment was true, and prejudice inured to each of the borrowers from being required to stand trial along with the others, and having the evidence of each of the separate conspiracies introduced at their trial. The same principle, petitioner contends, compels the reversal of his conviction in the instant case.

The principles enunciated by this Court in *Berger* and *Kotteakos* have suffered significant erosion over the years at the hands of the Courts of Appeals, particularly in the context of drug cases such as the one at bar. *See, e.g., United States* v *Warner*, 690 F2d 545 (6th Cir. 1982), relied on by the trial court in the case at bar. Such a development should not, of course, be countenanced by this Court, and the grant of certiorari in the case at bar would furnish the Court with an appropriate vehicle to redefine the principles of *Berger* and *Kotteakos* in present-day terms, and in the context of the kind of conspiracy prosecution in which consistently gives rise to this sort of problem.

Additionally, relief should be granted in the instant case because of the very real possiblity that the petitioner suffered the precise kind of prejudice which the *Kotteakos* rule was designed to prevent, and that had the evidence been limited to proof of activities in which he was said to have had a hand, the jury's verdict may have been different.

It will be recalled that, despite the fact that there was direct testimony regarding petitioner's alleged marijuana dealings, he was acquitted of the marijuana conspiracy charge. He was likewise acquitted of substantive charges relating to cocaine in the face of

substantial circumstantial evidence. Thus, at the very least, the case against him was viewed by the jury as less than overwhelming.

It should also be noted that after its review of the record, the Sixth Circuit held that the defendant Gazie was denied a fair trial by the admission of evidence regarding marijuana transactions in which he was not said to have been involved. If Gazie's right to a fair trial on charges of cocaine trafficking were fatally prejudiced by evidence relating to marijuana transactions, how much greater would the prejudice be to the petitioner McClain from evidence relating to cocaine transactions which the jury should never have heard in the case against him because they were the work of a conspiratorial group of which he was not shown to have any part.

II

THE DECISIONS BELOW REPRESENT AN UNTOWARD APPLICATION OF THE "SURVEILLANCE LOCATION PRIVILEGE" WHICH DEPRIVED PETITIONER OF ACCESS TO INFORMATION WHICH MAY HAVE CONTRIBUTED SIGNIFICANTLY TO HIS DEFENSE

In the course of the investigation which ultimately led to the indictment upon which petitioner was convicted, the government sought and received orders authorizing the installation and monitoring of electronic surveillance devices in the homes of several of the investigation's targets. A number of the conversations intercepted through the use of these "bugs" were admitted at trial. While petitioner was not himself intercepted in the course of the electronic surveillance, a number of drug-related references to a person whose name sounded like "Rod" were overheard and formed a significant portion of the evidence against petitioner. Additionally, trial testimony as to the identity of certain of the participants in the conversations was offered by the government, based in part, upon review of the tapes of the electronic surveillance.

When the government first offered testimony regarding the electronic surveillance, the defense attempted to cross-examine the testifying agent regarding the nature and location of the "bugs," and the way in which they were concealed in the room in which they were installed. This information was sought, it was explained, in order to

enable the defense (perhaps with the assistance of an independent expert) to evaluate the way in which the nature and location of the "bugs" might affect or distort the sound of the intercepted communications. Such testimony might, it was suggested, either undercut the validity of certain voice identifications or offer a basis upon which to argue that what was recorded on the tape was not an accurate rendition of what was said by the speakers, and, for example, that what sounded like "Rod" was not really "Rod."

The government objected to the examination, claiming that to reveal details of its interception techniques might hinder future investigations. After the trial judge heard an *in camera* presentation from the government, it upheld the government's claim of privilege and its objections to the inquiry. The Court of Appeals likewise upheld the government's claim of privilege.

Although this Court has never addressed the existence or scope of a "surveillance location privilege.," several Courts of Appeals have acknowledged the existence of such a privilege, analogizing to the informer's privilege delineated in *Roviaro* v *United States*, 353 U.S. 53 (1957). *See, e.g., United States* v *Porter*, 701 F2d 1158 (6th Cir. 1983); *United States v Harley*, 682 F2d 1018 (D.C. Cir. 1982). Thus, this Court might appropriately grant certiorari in the case at bar if for no other reason than to authoritatively determine the question of the existence and scope of such a privilege, if one may properly be said to exist.

While governmental assertions of privilege may not be inherently suspect, they should certainly be carefully examined when they operate to the detriment of individual rights. *See, e.g., United States v Nixon*, 418 U.S. 683 (1974). While petitioner has never been apprised of the contents of the *in camera* factual showing made by the government in the instant case, and so cannot assess the proper weight to be accorded the government's claim for a need for secrecy, it is clear upon the face of the opinion of the Court of Appeals that his own assertion of a need for the information has been at the very least misunderstood and undervalued.

The Court of Appeals apparently was under the impression that the defense sought information regarding the electronic surveillance equipment solely for the purpose of questionning voice identification. Since most of the people who were intercepted testified at trial, the panel seemed to conclude that therefore the information was thus

minimal. However, as noted above and explained to the trial court, the information which the defense sought might well have led to a challenge to the capacity of the equipment to clearly and accurately present the conversations intercepted to the jury. Thus, if the container in which the microphone was placed produced particular forms of resinance or other types of distortion, the defense might have been able to argue that the tapes did not truly reproduce certain words or phrases which were important to the government's case (such as the words which appeared to be references to "Rod").

Such assertions may at first blush seem speculative or even fanciful, but petitioner is forced to deal in the realm of the speculative precisely because the information which he sought was withheld from him. Further, because the decision to withhold that information was based upon information kept secret from him, he can only speculate about the nature of the government's assertion of the need to keep the information secret. Thus, there is no way of knowing what the government claims or could show that specific investigations might be imperilled by disclosure, or to point to any scrap of information regarding the equipment and its location that might buttress his own claims that disclosure of the information might lead to fruitful avenues of exploration for the defense.

Even the cases which recognize these "surveillance location privilege" also recognize that an assertion of that privilege cannot stand where it interferes with a defendant's right to a fair trial. *United States v Porter*, 701 F2d *supra* at 1162-63. In *Roviaro*, this Court was at pains to delineate the kinds of circumstances in which the government's assertion of an informant's privilege must fail. Yet none of the cases defining the "surveillance location privilege," including the decision below, set forth with particularity similar guidelines for the application of the privilege.

Is the government required to show that a particular investigation will be compromised, or is it sufficient merely to claim fear of compromising future investigations in general? By what measure of proof must the government establish that its fears are justified? Must a trial judge explore whether measures short of total suppression of the information (such as partial disclosure or disclosure under order of confidentiality) will adequately protect government interests in secrecy? What threshhold showing of need must a defendant make? The burgeoning use of electronic surveillance suggests the need for guidelines similar to those enunciated in *Roviaro* for the application

of this new privilege -- if this privilege exists at all. This Court should grant certiorari to resolve the question of the existence and scope of the privilege, and to dileneate guidelines for its application. Beyond this generalized need, the Court should grant certiorari in the instant case because in upholding the government's assertion of the privilege as against the petitioner, the courts below gave insufficient weight to his claims of need for the information which was kept from him.

Indeed, the use to which petitioner sought to put the information withheld from him is precisely the kind of use which most justifies the disclosure of that information, and, absent a particularly compelling showing by the government, it seems clear that his access to that information should not have been barred.

CONCLUSION

The defendant was denied a fair trial by the prejudicial variance of the proofs from the charge in the indictment. Because of this denial of his rights and because the affirmance of his conviction represents a departure from the principals of variance established by the decisions of this Court, the Court should grant certiorari and ultimately vacate his conviction either with or without the grant of a new trial at which the proofs would be properly limited.

Additionally, because the courts below improperly applied the so-called "surveillance location privilege" to deny the petitioner access to information regarding the electronic surveillance devices employed in the investigation which might well have provided significant assistance in his defense, the Court should grant certiorari to review the proper scope and application of such a privilege (if such a privilege is held to exist), and because it was misapplied in the instant case, reverse the defendant's conviction and order a new trial at which proper inquiry regarding this equipment might be made.

Respectfully submitted,

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FILED

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JOHN P. HEHMAN, Clerk

APPENDIX
Nos. 83-1851
83-1852
83-1860

UNITED STATES OF AMERICA
UNITED STATES COURT OF APPEALS

UNITED STATES OF AMERICA,
Plaintiff-Appelle,

vs.

RICHARD DAVID GAZIE (83-1851), RODERICK ANDREW McCLAIN (83-1852), and EDWARD WRAY (83-1860),

Defendants-Appellants..

ON APPEAL From The United States District Court for the Eastern District of Michigan.

Decided and Filed February 26, 1986

Before: ENGEL and JONES, Circuit Judges; and SPIEGEL*, District Judge

SPIEGEL, District Judge, delivered the opinion of the Court, in which JOHNS, Circuit Judge, joined. ENGEL, Circuit Judge, (pp.___) delivered a separate opinion, concurring in part and dissenting in part.

SPIEGEL, District Judge. Richard Gazie, Roderick McClain, and Edward Wray appeal their criminal convictions for various drug-related offenses. The jury found all three guilty of conspiracy to possess and distribute cocaine in violation of 21 U.S.C. § 846 (count 1); McClain was acquitted of interstate travel in aid of racketeering, 18 U.S.C. §

*The Honorable S. Arthur Spiegel, District Judge of the United States District Court for the Southern District of Ohio, sitting by designation.

1952 (count 2), distribution of cocaine, 21 U.S.C. § 841 (a) (1) (count3), and conspiracy to possess and distribute marijuana, 21 U.S.C. § 846 (count 5); Wray also was convicted of conspiracy to possess and distribute marijuana, 21 U.S.C. § 846 (count 5).

I. PROCEDURAL HISTORY

On January 14, 1983, a grand jury returned an indictment charging Gazie, McClain, Wray, Lyle Parks, and eight others with drug-related violations. In count one, all twelve defendants were charged with conspiracy to possess and distribute cocaine between late 1980 and September 1982 in the Eastern District of Michigan and elsewhere in violation of 21 U.S.C. § 846. In count two, McClain was charged with interstate travel in aid of racketeering in violation of 18 U.S.C. § 1952 for allegedly traveling from Miami to Detroit on January 30, 1982 and thereafter distributing and conspiring to distribute eight ounces of cocaine. In count three, McClain was charged with distributing approximately eight ounces of cocaine on January 30, 1982 in violation of 21 U.S.C. § 841 (a) (1). In count five, McClain, Wray, and Parks were charged with conspiracy to possess and distribute various quantities of marijuana between 1977 and May 1982 in the Eastern District of Michigan and elsewhere in violation of 21 U.S.C. § 846. All defendants except for the appellants and Parks entered guilty pleas prior to jury selection. Parks pled guilty to count four of the indictment pursuant to a Rule 11 agreement after the impanelment of the jury. The jury trial continued as to counts one, two, three, and five.

II. FACTUAL BACKGROUND

We present the facts in the light offered by the government to the extent that the jury's verdicts indicated that the government's evidence was believed. In view of our disposition of the issues on appeal, only the following brief outline of the facts is necessary.

Lyle Parks was instrumental in causing large quantities of cocaine and marijuana to be brought from Florida to Michigan and then sold in various places, including Michigan, Colorado, and Toronto, Canada. Parks resided in Saginaw, Michigan during the period in question. McClain, who resided in Florida, was implicated directly by a co-conspirator in several marijuana transactions, but the jury apparently disbelieved this evidence. The jury did believe, however, the evidence indicating that McClain was a source of cocaine for the Michigan-based members of the cocaine conspiracy. Wray, who resided in several

locations in Michigan during the period in question, was involved in transporting, processing, buying, and selling large quantities of both cocaine and marijuana. Gazie, who resided in Florida, was one of Park's cocaine sources. No evidence was presented at trial that even indirectly linked Gazie to marijuana, other than Gazie's association with persons involved in both the cocaine and marijuana conspiracies. Six co-conspirators who previously had pled guilty testified at trial; some of them gave evidence as to only one of the two controlled substances in question, while others testified relating to both.

III. SEVERANCE UNDER RULE 8(b)

Gazie appeals the refusal of the trial court to sever his case from that of the other two defendants.[1/] Gazie first raised the issue by oral motion early in the trial; he failed to make a pretrial motion.[2/] R., Vol. I, at 90-102. Initially, then, we must decide whether Gazie's motion for severance was timely.

1/ Gazie relies on Fed. R. Crim. P. 8(b), rather than Fed. R. Crim. P. 14. We delineated the difference between the two rules in *United States v. Williams*, 711 F. 2d 748 (6th Cir.), *cert. denied*, 464 U.S. 986 (1983).

A motion for severance based on misjoinder under Rule 8 alleges an error in the indictment, and severance *must* be granted if the defendants were improperly joined. Rule 14 comes into play only if joinder was initially proper under Rule 8 but a joint trial would prejudice one or more defendants. It is addressed to the discretion of the trial judge. A denial of severance is reviewable to determine if there was an abuse of discretion.

2/ Id. at 750 (emphasis original) (citations omitted).

On appeal, Gazie appears to claim that he raised the issue of severance before trial. Gazie Brief, at 11. Wray similarly claims that all three appellants made motions to sever under Rule 8(b) prior to trial. Wray Brief, at 7. The record reveals that Gazie's attorney, during trial, represented to the district court that he had made a pretrial motion to sever. R., Vol. I, at 92. The trial judge then examined his motion file and the docket sheet, and discovered that only McClain and Parks had filed motions to sever. R., Vol. I, at 93-95. Gazie's attorney then specifically acknowledged that no motion for severance on behalf of his client had been filed. R., Vol. I, at 94. Our own review of the docket sheet, moreover, fails to disclose a pretrial motion for severance by Gazie. Under these circumstances, we find that no such pretrial motion was made.

First, we note that two other defendants, McClain and Parks, did file pretrial motions for severance. R., Vol. I, at 95. These motions, however, were made on behalf of defendants who were charged in both conspiracy counts. Gazie's severance motion, first made at trial, was distinct therefore in that it was based on Gazie being accused in only one of the two conspiracy counts. Gazie's counsel, moreover, was careful to explain the difference to the trial court when he orally raised the issue. R., Vol. I, at 96-97. Thus, it seems clear that the pretrial motion made by Gazie's co-defendants could not preserve for Gazie his misjoinder claim. *See, e.g., United States v. Robertson*, 706 F.2d 253, 255 (8th Cir. 1983).

We squarely face the question, then of whether a severance motion made for the first time at trial is timely. Precedent indicates that, at least as to a motion for misjoinder under Fed. R. Crim. P. 8(a) or (b), the motion must be made pretrial.[3/] *See United States V. Williams*, 711 F.2d 748, 750-51 (6th Cir.) (misjoinder under rule (8) (b)), *cert. denied*, 464 U.S. 986 (1983); *United States v. Rox*, 692 F.2d 453, 454 (6th Cir. 1983) (misjoinder under Rule (8) (a)). Gazie's oral motion for severance clearly was made based on misjoinder under Rule 8(b). R., Vol. I, at 97. Therefore, the motion was not timely made.

Under Fed. R. Crim. P. 12(f), the failure to bring a Rule 8(b) misjoinder motion pretrial "shall constitute waiver," except that "the court for cause shown may grant relief from the waiver." We therefore turn to whether Gazie may be granted relief despite his failure to raise timely his misjoinder motion.

We note that when Gazie orally raised his Rule 8(b) misjoinder motion at trial, the trial judge did not state that the motion was untimely, but instead denied the motion on its merits. R., Vol. I, at 90-102. The trial judge's failure to note the untimeliness of the motion occurred despite the trial judge's awareness that Gazie had not filed a pretrial motion, R., Vol. I, at 94, and despite Gazie's counsel's clear explanation of why his motion for severance was distinct from the

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3/ Federal Rule of Criminal Procedure 12(b) states in relevent part:

> (b) Pretrial motions.....The following must be raised prior to trial:
>
> ....
>
> (2) Defenses and objections based on defects in the indictment or information....

motions for severance filed pretrial by Gazie's co-defendants. R., Vol. I, at 96-99. The government, moreover, both at trial, and in its briefs to this Court, has failed to raise the issue of the untimeliness of Gazie's motion.

The failure of the trial judge to address the issue of timeliness at trial is potentially prejudicial to Gazie. First, no opportunity was offered Gazie to argue under Rule 12(f) for relief from waiver "for cause shown." We therefore lack any record from which to evalute the timeliness issue. Second, assuming that Gazie would have failed to show cause why relief should be granted, Gazie was lulled into believing that he had preserved the issue of misjoinder for appeal, making it appear unnecessary that he make a motion for severance under the more difficult standard of Rule14.[4/] Therefore, the failure of the trial court below to even mention untimeliness as a ground for denying Gazie's motion seems to us to be of more than just technical significance.

At issue, then, is whether the trial court's failure to rule on the grounds of untimeliness, or even to take note of the issue, is in effect "cause shown" such that we may grant relief. *See* Fed. R. Crim. P. 12(f); 8 J. Moore, Moore's Federal Practice, ¶ 12.03[3] (2d ed. 1985). Pertinent to this inquiry is *United States v. Worthington*, 698 F.2d 820 (6th Cir. 1983). In *Worthington*, defendant made his third motion to suppress evidence on the twentieth day of trial. While defendant

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4/ While we do not purport to decide the question, there is precedent suggesting that a Rule 14 motion for severance sometimes may be raised for the first time at trial even when a Rule 8(b) misjoinder motion would have been waived. *See generally Schaffer v. United States*, 362 U.S. 511, 516 (1960) ("trial judge has a continuing duty at all stages of the trial to grant a severance if prejudice does appear" when conspiracy court dismissed during trial); *United States v. Rox*, 692 F.2d 453, 454 (6th Cir. 1982) (court denied Rule 8(b) motion raised during trial as untimely, but considered on its merits Rule 14 motion also made during trial); 1 Wright, Federal Practice and Procedure, Criminal 2d § 221, at 769-75 (2d ed. 1982). *But see Williams*, 711 F.2d at 750; *United States v. Swainson*, 548 F.2d 657, 661 (6th Cir.), *cert. denied*, 431 U.S. 937 (1977); Fed. R. Crim. P. 12(b) (5). *case*, we disagree. The district court overruled the mid-trial motion to suppress on both timeliness grounds and on the merits. That it chose to rule on the merits at all does not alter the fact that the motion to suppress was made in violation of Fed. R. Crim. P. 12(b) (3), nor does it alter the fact that defendant waived the objection under Criminal Rule 12(f).

denominated this action a "renewal" of his past motions to suppress, it was made on a new ground and hence was ruled to be a new motion. *Id.* at 824. On appeal, we stated:

> Appellant further argues that since the district court ruled on the merits of his third motion to suppress, the issue was preserved for appeal. *Under the facts of this*

Id. at 824 (emphasis added) (citations omitted).

Worthington is based on sound policy grounds. Trial courts, as well as appellate tribunals, frequently cannot resist the urge to rule on substantive grounds, even after disposing of an issue on procedural grounds. This impulse doubtless arises in part from the desire to demonstrate that substantive justice is not being sacrificed on the altar of procedural nicety. To allow a defendant to overcome a waiver under Rule 12(f) simply on this predilection of the courts, when the timeliness issue in fact has been raised directly and cited as a basis of decision, would create an underserved windfall, and would undermine the policy of judicial efficiency underlying Rule 12(b)'s requirements.

The present case, however, differs from *Worthington*. Here, the timeliness issue never was mentioned or argued below, and was not relied on by the trial court as even a partial basis for its decision. Defendant thus was prejudiced not only by the lack of opportunity to demonstrate cause under Rule 12(f), but also by the mistaken belief that he had preserved the merits of the misjoinder ruling for appeal, and therefore need not proceed to argue for severance under Rule 14. Under these circumstances, we told that there is cause shown why relief should be granted from Gazie's waiver of his misjoinder objection.[5/] We therefore proceed to a consideration of the merits of Gazie's misjoinder claim.

Fed. R. Crim. P. 8(b) provides:

5/ Our holding is not based on the government's failure to make a timely argument that defendant waived its objection. *See* 8 J. Moore, Moore's Federal Practice ¶ 12.03[2] at 12 29 to 12-30 (2d ed. 1985) (collecting cases on whether government must make a time argument of waiver under Rule 12).

> (b) Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactons constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all the defendants need not be charged in each count.

In *United States v. Hatcher*, 680 F.2d 438, 441 (6th Cir. 1982), we stated: "The joinder of multiple defendants is proper under Rule 8(b) only if each of the counts of the indictment arises out of the same act or transaction or series of acts or transactions. . . ." The question, then, is whether count one and count five of the indictment, each alleging separate conspiracies to distribute, respectively, cocaine and marijuana, allege "the same series of acts or transactions constituting an offense or offenses." Fed. R. Crim P. 8(b).

We note initially that the indictment on its face charges two distinct and separate conspiracies. While the government argues that the two conspiracies could have been joined into one count, Gov. Brief, at 29, it seems plain that an indictment charging one conspiracy is different from an indictment charging two conspiracies. The government could have charged all defendants with conspiracy to distribute both marijuana and cocaine in as single count, if it believed that a single conspiracy existed. If the indictment had been so framed, the fact that one alleged co-conspirator was charged directly with only one type of drug would not, in itself, bar a finding that a single conspiracy to possess and distribute mairjuana and cocaine existed. *See United States v. Dickey*, 736 F.2d 571 (10th Cir. 1984) (single conspiracy to possess and distribute marijuana and cocaine charged), *cert. denied*, 105 S. Ct. 957 (1985). If the government believed it could establish one conspiracy, and had framed its indictment in such terms, then joinder would have been proper, because an allegation of a common conspiracy, and had framed its indictment in such terms, then joinder would have been proper, because an allegation of a common conspiracy satisfies the Rule 8(b)

requirement of a "series of transactions."[6/] *See, e.g., United States v. Gentile*, 495 F.2d 626, 631 (5th Cir. 1974) (citing *United States v. Banks*, 465 F.2d 1235 (5th Cir.), *cert. denied*, 409 U.S. 1062 (1972)). Here, however, the government chose to indict twelve defendants in the cocaine conspiracy count, and only three of those individuals in the marijuana conspiracy count. This division suggests that the government's decision to frame its indictment in terms of two separate conspiracies was based on a well-considered judgment that the available evidence demonstrated that two separte conspiracies, one concerning cocaine, the other marijuana, had existed.

Our focal point, thus, is whether the separate conspiracies charged in count one and count five constitute the same series of transactions for purposes of Rule 8(b). In *Hatcher*, we decided that misjoinder could exist "even if all counts of the indictment included a common defendant." 680 F.2d at 441. Thus, that Gazie was the only defendant not common to both counts at the time the motion was made is not determinative. Both defendants in *Hatcher* were indicted on three counts relating to possession and distribution of heroin during May and June of 1978, and one count of possession of cocaine in February of 1979. *Id.* at 440. We held, despite that partial overlap in the time periods of the crimes, that "the indictment on its face alleges no connection between Manetas and the cocaine-related charges again *Hatcher*," and we consequently reversed Manetas' heroin-related conviction.

The government, during trial and in its appellate brief, attempts to distinguish *Hatcher* from the present case by noting that the indictment and evidence at trial showed that Lyle Parks caused both substances, cocaine and marijuana, to be moved by common couriers, and that Parks' residence in Saginaw was used to distribute both substances. Gov. Brief, at 28-29. We note, however, these factors: (1) the twenty overt acts alleged in count one (cocaine), with few exceptions, were separate entirely from the seven overt acts charged in count five (marijuana); (2) count one alleged a conspiracy beginning in late 1980 and continuing until approximately September 1982, while count five

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6/ Of course, we are not suggesting that the government routinely charge one conspiracy when it lacks proof that only one conspiracy existed. If the indictment charges one conspiracy, but the evidence at trial indicates several, the defendant can argue that there is a prejudicial variance between the indictment and the evidence. *See, e.g., Dickey*, 736 F.2d at 581-83; *United States v. Warner*, 690 F.2d 545, 548 (6th Cir. 1982).

alleged a conspiracy beginning in 1977 and continuing until approximately May 1982; (3) the indictment charged twelve defendants in count one and only three in count five; and (4) nothing in either the indictment or the proofs at trial linked Gazie in any way to marijuana. Under these circumstances, we hold that count one and count five of the indictment did not constitute the "same series of transactions," and thus that the marijuana conspiracy count was misjoinded with respect to Gazie.

Resolving a conflict among the Circuits, the Supreme Court recently ruled that Rule 8(b) misjoinder claims are subject to a harmless error analysis. *See United States v. Lane*, 54 U.S.L.W. 4123, 4126 (U.S. Jan. 27, 1986). The Court noted that this Circuit, by virtue of its ruling in *Hatcher*, had been applying such a test. *Id.* at 4124 n.1. We proceed, then, to decide whether Gazie was actually prejudiced by the misjoinder. The *Lane* Court, in considering whether the claimed error before it was harmless, responded in the affirmative, observing, in addition to overwhelming evidence of guilt, that proper limiting instructions were given during the course of the trial and in the final instructions on the law to the jury. The Court further observed that the same evidence that was admitted with respect to the misjoined count likely would come in under Fed. R. Evid. 404(b) during a joint retrial for the purpose of establishing the intent of one of the co-defendants.

Previously, this Court had held that misjoinder constituted harmless error "only where the unrelated charge and the evidence supporting that charge is such an inconsequential part of the joint indictment that no possible harm from misjoinder could reasonably have occurred'." *United States v. Bibby*, 752 F.2d 1116, 1122 (6th Cir. 1985) (quoting *Hatcher*, 680 F.2d at 442), *app. pnd'g*. Prejudice, therefore, was shown "if the extent of the proof [of the misjoined charges] is significantly greater that that reasonably used to demonstrate other crimes or if [the] focus of the trial is shifted away from proof of the properly joined offense(s)." *Id.*

While the *Lane* holding plainly is not as broad-based as ours in *Bibby*, we nonetheless believe that the error claimed by Gazie was not harmless. *Lane* involved a father and son duo who, between them, arranged for a duplex to be burned as part of an insurance fraud scheme; they were planning to have a flower shop torched for the same purpose. Plans went awry, however, after their arsonist was apprehended for an unrelated crime. In addition, prior to the duplex fire, the father orchestrated a restaurant fire; the son was not involved in

this event. Both father and son were indicted. The father was charged in counts 1 (restaurant fire), 2-4 (duplex fire), and 5 (attempted flower shop fire), while the son was charged in counts 2-5 and 6 (perjury before the grand jury investigating their arsonist). The Fifth Circuit ruled that count 1, because it was not part of the same series of transactions, was joined improperly with counts 2-6. Invoking the *per se* rule, it consequently reversed both convictions and remanded for new trials. as we indicated, on appeal the Supreme Court reversed on this issue. After establishing that a harmless error test was to apply, the Court concluded that overwhelming evidence of guilt, limiting instructions given to the jury during trial and prior to deliberations, and possible admissibility of the evidence relating to the misjoined count upon joint retrial rendered the error harmless.

The instant facts are meaningfully different. Defendant Gazie, one of twelve individuals indicted, was charged on only one of five counts and was alleged to be a participant in only one (cocaine) of the two (cocaine and marijuana) drug conspiracies. Such is in sharp contrast to a situation involving two indicted defendants, each charged with five of the six counts handed down by the grand jury. It is true that the jury received limiting instructions in the trial court's final charge. however, the district judge declined to give these during the course of the trial. Not only was the marijuana count a significant part of the indictment, but also the trial record shows that a substantial portion of the proceedings was spent introducing evidence relevant only to the marijuana conspiracy. This evidence concerning marijuana transactions obviously was not admissible against Gazie. Because the potential for confusion of the evidence relating to the two conspiracies was great, we are loathe to term the evidence offered only in support of Gazie's guilt sufficiently overwhelming to pronounce the misjoinder harmless. Further, because, as we will indicate, reversal as to Gazie's co-defendants, is not warranted, no joint retrial will occur, thus eliminating the Supreme Court's concern that evidence relevant to the misjoined count inevitably will be admitted. Consequently, for these reasons, we believe that the evidence admitted as a result of the misjoinder exerted an injurious influence upon the jury.

We hold, then, that the misjoinder of the cocaine and marijuana conspiracy counts was prejudicial to Gazie in that it substantially influenced the jury; thus, the conviction of Gazie under count one of the indictment must be and is hereby reversed. McClain and Wray also

appeal based on the trial court's failure to grant severance.[7/] While we reverse as to Gazie in this regard, we decline to do the same with respect to his co-defendants. As noted earlier, because McClain and Wray were named in both conspiracy counts, their situations differ significantly from that of Gazie. After a careful review of the indictment and record, we conclude that the trial court's refusal to sever McClain and/or Wray neither was an abuse of discretion nor error.

IV. EXHIBIT SEVEN

Gazie and McClain[8/] also appeal the trial court's admission of government exhibit 7 into evidence, and the failure of the trial judge to give a limiting instruction thereto. Exhibit 7 originally was used as an adjunct to testimony and closing argument. The exhibit displayed the names of places, and, underneath each place, a list of alleged conspirators.[9/] Defendants did not below, and do not now, object to the chart's use during the trial. R., Vol. XIII, at 1654, 1656; Gazie Brief, at 28-32. Defendants, however, did below and do on appeal object to the exhibit's admission into evidence and subsequent availability in the jury room.

The trial judge admitted the chart into evidence under Fed. R. Evid. 1006. Initially, we note that Rule 1006 provides only for the admission of summaries of voluminous writings, recordings, and photographs. Without a doubt, however, the government's counsel offered the exhibits as a summary of the testimony presented during trial.[10/] As we noted in *United States v. Scales*, 594 F.2d 558, 563 (6th Cir.), *cert.*

7/ While McClain fails to cite directly Rule 14, he admits that joinder was proper under Rule 8(b); accordingly, we view his appeal as if grounded on Rule 14. McClain Brief, at 22-26. Wray, however, plainly relies on Rule 8(b).

8/ McClain adopted Gazie's argument on this issue pursuant to Fed. R. App. P. 28(i).

9/ The chart also contained the dates of Wray's two Michigan residences. In their appeals, defendants do not quibble over inclusion of these dates. *See* Gazie Brief, at 28-29.

10/ "I would offer the chart as an aid for the jury to take into the jury room with them, only because of the sheer volume of people that have been testified about during the course of this trial." R., Vol. XIII, at 1652.

denied, 441 U.S. 946 (1979), summaries of testimony "cannot be said to come within the requirements of Rule 1006." Rather, authority for their introduction would exist under Fed. R. Evid. 611(a). [11/] *Id.* at 563-64 (citing J. Weinstein & M. Berger, 5 Weinstein's Evidence ¶ 1006[03] at 1006-9 (1983) (hereinafter Weinstein's Evidence)).

When summaries of testimony are introduced into trial under Rule 611(a), their purpose is "simply to aid the jury in its examination of the evidence already admitted." *Scales*, 594 F.2d at 563. Because of the danger of misleading the jury, we have required a limiting or guarding instruction "to the effect that the chart is not itself evidence but is only an aid in evaluating the evidence." *Id.* at 564. Even with such a limiting instruction, there is authority to the effect that the better practice is to allow the exhibit to be used only as a demonstrative adjunct to allow the testimony, and not to allow the chart to be formally admitted into evidence and thus go to the jury room. *See* 5 Weinsteins's Evidence ¶ 1006[07] at 1006-16 (such pedagogical devices "should not be allowed into the jury room without the consent of the parties since they are more akin to agrument than evidence") (footnote omitted). Some charts, moreover, are so misleading or conclusory that their use in any fashion during trial would be improper, even with limiting instructions. *Scales*, 594 F.2d at 564. 594 F.2d at 564.

In the present case, while the government stated that it wanted the chart admitted into evidence only as an "aid" to the jury because of the sheer volume of testimony given during trial, no limiting instruction was given. It was error for the trial judgement to have permitted the exhibit to be admitted formally into evidence, and used by the jury

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11/ Rule 611(a) is a codification of the traditional power and obligation of trial judges to control the presentation of evidence. it provides:

> The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

Rule 611(a) gives trial judges the authority to decide questions relating to demonstrative evidence. *See* Fed. R. Evid. 611 advisory committee notes. Rule 1006, in contrast, is concerned with the application of the best evidence rule to "voluminous writings, recordings, or photographs which cannot conveniently be examined in court." Rule 1006 allows for such evidence to be "presented in the form of a chart, summary, or calculation."

during its deliberations, without such an instruction. As noted above, the admission of such exhibit into the jury room, even with a limiting instruction, is itself open to question. At a minimum, the jury needs to be told that the chart is not be relied on as substantive evidence.

Defendants made a timely objection to the chart's admission into evidence, but did not request a limiting instruction. In *United States v. Seelig*, 622 F.2d 207, 214 (6th Cir.), *cert. denied*, 449 U.S. 869 (1980), this Court responded to a failure to give a limiting instruction concerning a summary exhibit simply by noting that defendant had not asked for one. We decline to decide the present case on the basis that the defendant's objection did not preserve for appeal the failure to give a limiting instruction. Rather, we hold that the failure to give a limiting instruction was harmless error as to McClain. The major danger to McClain, aside from the possibility that the jury might perceive the chart as substantive evidence, arose from the chart's failure to list separately the participants in the cocaine and marijuana conspiracies. Given the jury's ability to separate the offenses with which McClain was charged, as demonstrated by the jury acquitting him on the marijuana conspiracy, distribution of cocaine, and racketeering counts, while convicting him on the cocaine conspiracy count, we find that he was not so prejudiced. *See United States v. Conlin*, 551 F.2d 534, 539 (2d Cir.), *cert. denied*, 434 U.S. 831 (1977) (defendant not deprived of fair trial by improper use of chart when jury acquitted on five of thirteen items with which chart dealt).

The failure to separately list the participants in the two conspiracies may have been prejudicial to Gazie, who, unlike McClain, was charged in only one of the two conspiracy counts. Obviously, the jury had no opportunity to demonstrate its separation of the cocaine and marijuana evidence in regard to Gazie, who was convicted of the single charge against him. But because we already have reversed Gazie's conviction on the basis of misjoinder, we need not decide whether Gazie was prejudiced.

V. SURVEILLANCE LOCATION PRIVILEGE

Wray and McClain[12/] appeal based on the district court's refusal to require the government to reveal the type and location of electronic surveillance microphones. The investigation leading to the indictments

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12/ McClain adopted Wray's argument on this issue pursuant to Fed. R. App. P. 28(i).

included judicially-authorized wiretaps, which recorded telephone conversations, and judicially-authorized electronic surveillance, which recorded conversations occurring at certain residence. Defendants, during trial, sought information concerning the type of electronic surveillance microphones used, and the exact location within the residences of each microphone for the purpose of disputing voice identification evidence introduced by the government. They argue that, because the microphones were placed in a container for the purpose of concealing them, the recorded voices were distorted. To introduce expert testimony as to the likelihood and kind of distortion, defendants claimed a need to know both the type and location of the devices.

The government countered with a surveillance location privilege, maintaining that future law enforcement efforts would be hindered greatly if this information was revealed. The trial judge conducted an ex parte, in camera hearing[13/] at which the government amplified its position. On the basis of such information presented to the Court, notwithstanding defendants' proffered reasons, the trial judge upheld the government's refusal to disclose the particulars of its surveillance techniques.[14/]

In *United States v. Harley*, 682 F.2d 1018, 1020-21 (D.C. Cir. 1982), the Court of Appeals for the District of Columbia Circuit upheld application of the surveillance location privilege to trials on the merits. Analogizing the surveillance location privilege to the informer's privilege, the court stated that defendants seeking such information must demonstrate their need for the information, after which the trial judge should weigh a defendant's handicap against the policies underlying the privilege. *Id.* at 1020 (citing *Roviaro v. United States*, 353 U.S. 53, 60, 62, 77 (1957)).

Harley concerned the government's refusal to disclose the location of an apartment used for police surveillance. Defendants sought this information to cast doubt on the officers' ability to make identifications

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13/ On behalf of the panel, Judge Spiegel examined this sealed portion of the record.

14/ Critical to our review of this question was the record created by the trial judge by virtue of his conducting the ex parte, in camera hearing and later listing for the parties the factors underlying his decision in favor of the United States. We urge all trial judges faced with such an issue to conduct themselves in a similar fashion.

from their surveillance site. *Id.* at 1020. Plainly, defendants' desire in the present case to cast doubt on the government's voice identification evidence is analogous. The *Harley* court was concerned with the safety of the cooperating apartment owner, and with the willingness of citizens to so cooperate with police in the future. *Id.* While this exact concern is not implicated here, the same underlying principle applies: if the information is revealed, future law enforcement efforts will be hindered. We therefore find that the surveillance location privilege, as articulated in *Harley*, is applicable to information regarding the type and location of electronic surveillance devices used by the government in building its case for prosecution.

Without a doubt, in some instances, information sought by a defendant may be so critical that his Sixth Amendment right to confrontation would outweigh the government's asserted needs for the privilege. The fundamental importance of the defendant's right to a fair trial, in those cases, would have to be honored. *See, e.g., United States v. Porter*, 701 F.2d 1158, 1162-63 (6th Cir.) (refusal to allow defendants were deprived of fair trial), *cert. denied*, 464 U.S. 1007 (1983). The government then would have the option of revealing the requested information, or maintaining its secrecy by not using the evidence derived from the particular surveillance device or location in question.

The balancing process recited above takes place after careful evaluation of the particular facts of each case. In the present case, because the government's articulated need for the privilege was substantial and the handicap to defendants, if any, was minimal, we hold that the trial judge's decision was proper. Numerous factors support his finding that defendants were not unduly handicapped. To begin, McClain's voice was absent entirely from the tapes used by the government at trial. *See* McClain Brief, at 1. While Wray's voice was intercepted during several telephone conversations by the use of a wiretap, the information defendants' sought concerned the electronic surveillance, rather than wiretap, technology that allowed the government to record conversations occuring within certain residences. Wray claims that his voice was present in the background of one of the recorded telephone conversations, and that, therefore, in at least that instance, the device employed must have been something in addition to a wiretap. Initially Wray's allegation strikes us as most unlikely, but even if true, he fails to articulate the importance of identifying his voice when recorded as background, given that a clear opportunity also existed during these same conversations for identifying his voice when

he was speaking directly into the telephone. Accordingly, the government's refusal to disclose in no way affected voice identification evidence relating to either of the defendants.

We recognize that the identification of the voices of co-conspirators is of some significance, yet we note that all but one of the participants in the disputed conversations were present and testified at the trial. Defendants consequently had ample opportunity to cross-examine, thus minimizing to a significant extent their need for type and location information for the purpose of countering voice identification of co-conspirators. Finally, we observe that the conversations recorded by electronic surveillance were but a minor part of the government's case. Ample testimony corroborated evidence revealed through the tapes.

VI. CONCLUSION

We have carefully considered the remainder of appellant' arguments and find them to be without merit.

For the reasons stated above we affirm the convictions of appellants McClain and Wray. We reverse Richard Gazie's conviction on count one, and remand for further action not inconsistent with this opinion.

No. 83-1851/1852/1860 - United States of America v. David Gazie, et al.

ENGEL, Circuit Judge, concurring in part . I respectfully dissent from the majority decision to the extent it reverses the conviction of defendant Gazie because of misjoinder. It is true, as the majority opinion points out, that Gazie's involvement in the conspiracy appears limited solely to his dealings in cocaine, and not in marijuana. In my opinion, however, even if the cocaine and marijuana conspiracies were separate, as alleged in the indictment, it was not error for the trial court here to have denied their severance. Judge Harvey's reliance upon *United Sates v. porter*, 701 F.2d 1158 (6th Cir. 1983), was well placed and was in accord with our court's views on severance, as expressed in *United States v. Grunsfeld*, 558 F.2d 1231 (6th Cir. 1977); *United States v. Mayes*, 512 F.2d 637 (6th Cir. 1974), and other citations thereon. See also *United States v. Lane*, No. 84-744, slip op. (U.S. Jan. 27, 1986). The conspiratorial network involving the defendants here and the other unindicted or untried members of the conspiracy was complex and extensive both geographically and in time. Gazie's activities, though confined to cocaine, were clearly linked to members who were involved in trafficking in both substances during the same time, through the same couriers and other facilities such as those in Saginaw, Michigan, and through the services of Frank Durastanti in Florida.

The majority opinion appears to place importance upon the acquittal of defendant McClain on the marijuana-related charges as evidence of the jury's refusal to believe the testimony concerning the marijuana aspect of the trial. In my opinion, this *post hoc* conclusion that the counts were improperly joined in the first place does not necessarily follow. While we cannot know what prompted the jury's action in acquitting McClain's involvement in both marijuana and cocaine was all part of a single conspiratorial agreement, or that the law was sufficiently vindicated if they convicted him only of the cocaine conspiracy. Certainly, there is ample evidence tying him to both through the testimony of Albert Papson and others.

It is quite true that Gazie's specific involvement was limited to cocaine. He had a reliable source of substantial quantities of cocaine and he dealt with the several co-conspirators under circumstances in which he had to know and understand that it was being moved through the conspiracy and out into the rest of the United States at profit to him. The majority does not find that the evidence was insufficient to convict Gazie of the cocaine conspiracy and indeed the evidence of his involvement in this regard must be described as massive. For this reason alone, it is difficult to see how Gazie could in any event have been prejudiced by the evidence which was placed before the jury concerning the movement of marijuana. His attorney was very alert to interpose objections to the testimony of the witnesses concerning marijuana, and thus brought to attention then and through the instructions of the court Gazie's noninvolvement in marijuana conspiracy is at least some indication that it was able to separate the involvement of the different defendants and to follow the instructions of the trial court.

With complicated conspiracies, such as this appears to have been, it is not surprising that one conspirator will deal in one aspect of a conspiracy and that others may deal in other aspects. That one conspirator participates in but one phase of a conspiracy does not isolate him from involvement in the conspiracy as a whole nor compel his severance where the proofs are so intertwined. Had Gazie been charged with involvement in the marijuana conspiracy or had but one conspiracy been alleged, a more serious problem might have been faced, especially had he been convicted of all counts. That is not the case here, however.

In all other respects, I agree with the majority opinion, and I agree also with Judge Spiegel in his determination that the severance question raised by Gazie was properly preserved for appeal.